

ORIGINAL

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winstar

September 7, 2000

1615 L Street, NW  
Suite 1260  
Washington, DC 20036  
(202) 833 5678

**VIA HAND DELIVERY**

**RECEIVED**

SEP 7 2000

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W. Room TW-A325  
Washington, D.C. 20554

Re: Winstar Communications, Inc.; Written Ex Parte Presentation;  
WT Docket No. 99-217; CC Docket No. 96-98

Dear Sir/Madam:

Please find attached a letter from William J. Rouhana, CEO and Chairman of Winstar Communications, Inc., to Chairman William E. Kennard, Commissioner Ness, Commissioner Furchgott-Roth, Commissioner Powell, and Commissioner Tristani delivered today that concerns the above-captioned proceedings.

Pursuant to Section 1.1206(b) of the FCC's rules, 47 C.F.R. § 1.1206(b), I am submitting to the Secretary four copies of this *ex parte* presentation. Should there be any questions regarding the above, please do not hesitate to contact the undersigned at 202-367-7600.

Very truly yours,



Barry J. Ohlson  
Senior Director, Federal Regulatory Affairs

Enclosures

Cc:

Chairman Kennard  
Commissioner Powell  
Clint Odom  
Peter Tenhula

Thomas Sugrue (WTB)  
Joel Taubenblatt (WTB)  
Eloise Gore (CSB)  
Paul Noone (WTB)  
Richard Arsenault (WTB)

Commissioner Ness  
Commissioner Tristani  
Mark Schneider  
Adam Krinsky  
Jim Schlichting (WTB)  
Lauren Van Wazer (WTB)  
Cheryl King (CSB)  
Mark Rubin (WTB)

Commissioner Furchtgott-Roth  
  
Helgi Walker  
Kathy Brown  
Jeffrey Steinberg (WTB)  
Leon Jackler (WTB)  
Wilbert Nixon (WTB)  
David Furth (WTB)

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William J. Rouhana, Jr.  
Chairman  
Chief Executive Officer  
Winstar Communications

The Winstar Building  
685 Third Avenue  
31st Floor  
New York, NY 10017  
T (212) 584 4023  
F (212) 584 4072

The Honorable William E. Kennard, Chairman  
The Honorable Susan Ness, Commissioner  
The Honorable Harold Furchtgott-Roth, Commissioner  
The Honorable Michael Powell, Commissioner  
The Honorable Gloria Tristani, Commissioner  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

Re: WT Docket No. 99-217 and CC Docket No. 96-98

Dear Mr. Chairman and Commissioners:

This is to confirm our concern regarding the serious and growing problem of owners or operators of multi-tenant buildings unreasonably delaying or outright refusing operational access to common carriers seeking to provide telecommunications services. As one of the leading facilities-based competitive providers, Winstar seeks to serve businesses across the country, including small-to-large-sized businesses located in buildings not presently served by fiber. Winstar is the largest holder of spectrum in the United States. Winstar participated in auctions to obtain much of this spectrum. Yet, Winstar is prevented from effectively using its spectrum rights, infrastructure, and funds to efficiently reach consumers.

The breadth and scope of our wireless and wire line operations are continually restricted by our inability to obtain, in a cost effective and timely manner, access rights to all of the potential customer buildings within line-of-sight of the hub transmission sites being built by Winstar.<sup>2</sup> For example, a typical Winstar hub site is designed to serve up to 100 buildings. However, despite continuous efforts by the 200 members of our *Winstar for Buildings* Division, the average leased hub site currently has access rights to less than 20 buildings. Further, while after four years Winstar has obtained access rights to approximately 11,500 buildings, many of those buildings are acquired in "package negotiations" and will be reached only over the next several years as our hubs and network infrastructure are built out. In fact, because of the difficulty in obtaining timely access rights, we must obtain these rights and hold them in inventory well in advance of our planned usage. At best, these access rights only represent approximately 1.58% of the 750,000 commercial buildings in the nation despite our concerted efforts to broaden our building inventory.

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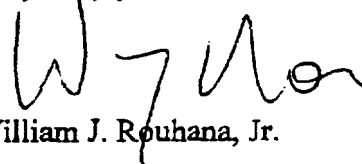
<sup>1</sup> Pursuant to Section 1.1206(b) of the FCC's rules, 47 C.F.R. § 1.1206(b), four copies of of this *ex parte* presentation are submitted to the Secretary.

<sup>2</sup> A graphic outlining the network architecture of a typical Winstar hub-to-customer-building broadband distribution system can be found at Attachment 1.

Included are three affidavits providing fresh evidence about discriminatory tactics and outright obstruction being faced by Winstar. These affidavits do not represent isolated instances.<sup>3</sup> Importantly, they evidence a specific and preventable impediment to the growth of facilities-based competition.

We strongly urge the Commission to adopt clear rules on September 14, 2000 stating that the Commission has jurisdiction over wire line and radio communications from the point of transmission to the end user, and that discriminatory practices which prevent consumers from reasonably choosing their provider of choice are actionable.

Very truly yours,



William J. Rouhana, Jr.

Attachments

cc: Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W. Room TW-A325  
Washington, D.C. 20554

Clint Odom  
Peter Tenhula  
Thomas Sugrue (WTB)  
Joel Taubenblatt (WTB)  
Eloise Gore (CSB)  
Paul Noone (WTB)  
Richard Arsenault (WTB)

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Lauren Van Wazer (WTB)  
Cheryl King (CSB)  
Mark Rubin (WTB)

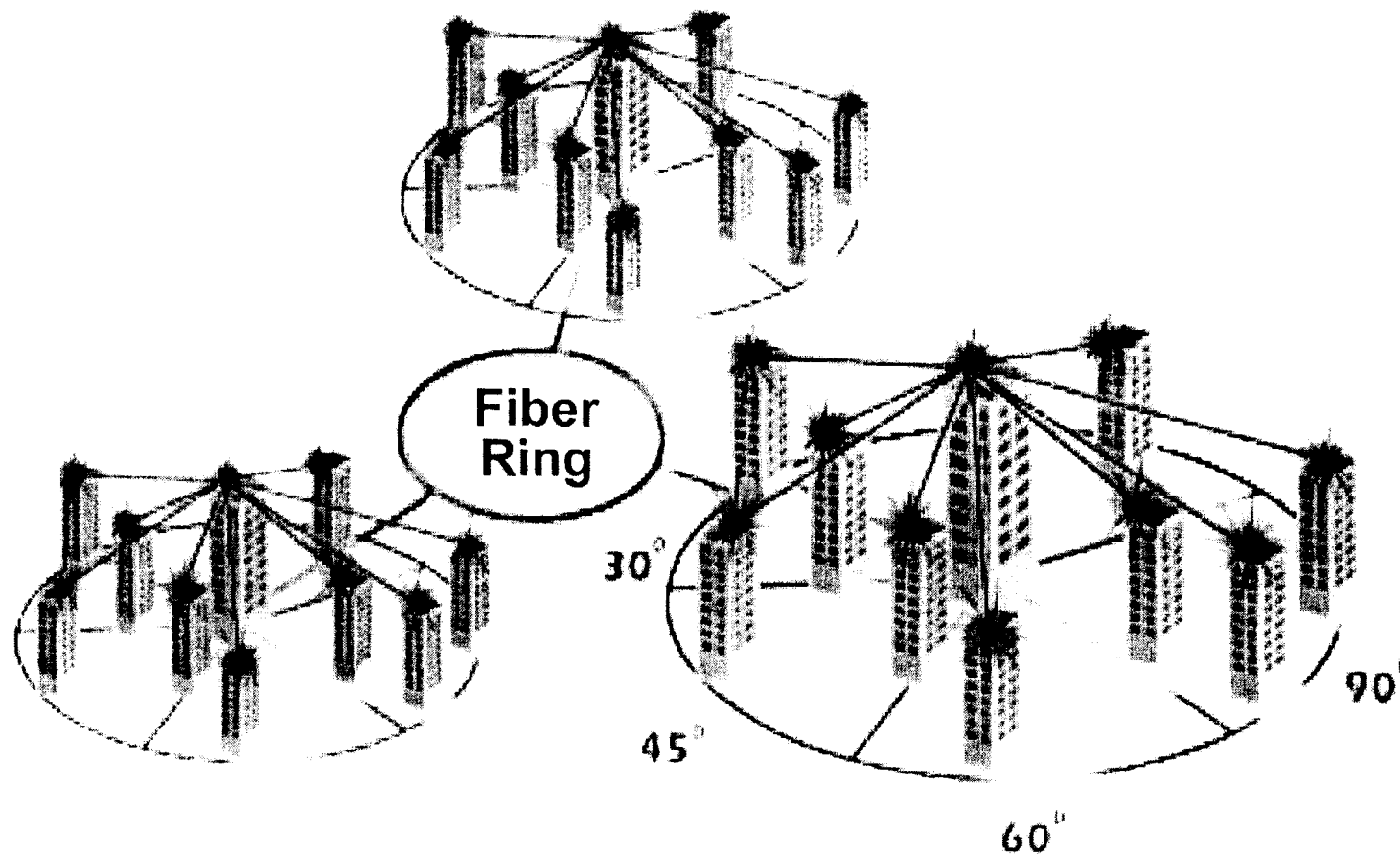
Helgi Walker  
Kathy Brown  
Jeffrey Steinberg (WTB)  
Leon Jackler (WTB)  
Wilbert Nixon (WTB)  
David Furth (WTB)

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<sup>3</sup> See September 1, 2000 filing in this docket by Edge Connections, Inc. Winstar was dismayed to learn that internal memorandums circulated by some building owners and building local exchange carriers (BLECs) have specifically targeted Winstar, Teligent, AT&T, NEXTLINK and others for "blackout" periods. This memorandum can be found at Attachment 3.

# Local Network Infrastructure

*Using fixed wireless and fiber to connect the "last mile"*

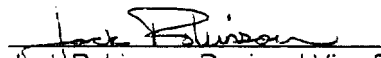


AFFIDAVIT

Jack Robinson declares as follows:

1. My name is Jack Robinson and I am Regional Vice President, Northeast Region, with Winstar for Buildings, the real estate division of Winstar Communications, Inc.
2. Part of my responsibilities is to negotiate master agreements with large owners and managers of commercial real estate to secure access for Winstar to commercial office buildings for the purpose of providing telecommunications services to tenants in the buildings.
3. Increasingly, Winstar is being confronted with situations where owners have entered into agreements with other competitive local exchange carriers (CLECs) or building local exchange carriers (BLECs) whereby the owners have obtained an equity position in the BLECs or CLECs. By doing so, these owners have a vested interest in prohibiting equal access to their buildings by all carriers.
4. A recent example of this is a 20-building portfolio located in New York City. The owner of the portfolio has acquired an equity interest in a BLEC. I have been advised that part of that agreement provides for severe financial penalties on the owner if the owner permits other carriers into their buildings prior to the middle of the year 2000.
5. In addition, three buildings in this portfolio were just recently acquired by the owner, and Winstar had pre-existing license agreements with the previous owners. Winstar has customers in each of the buildings and is attempting to serve other customers that have ordered its service, but the owner is refusing to honor those agreements even though it is legally obligated to do so. In one case, the customer canceled its order because Winstar could not get access to the building.
6. It is my belief that consumer access to their carrier of choice is a serious problem, particularly when the owners of commercial office buildings have a financial interest in a CLEC or BLEC. This problem will continue unless a national mechanism is put in place whereby discriminatory behavior is prohibited.

I declare under penalty of perjury, that the foregoing is true and correct to the best of my personal knowledge.

  
Jack Robinson, Regional Vice President, WfB

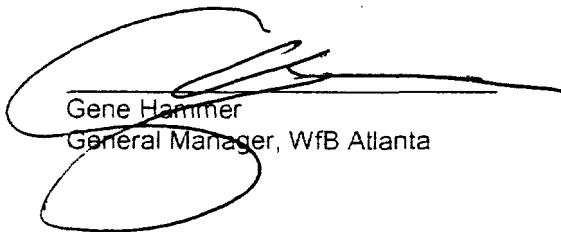
6-9-00  
Date

AFFADAVIT

Gene Hammer declares as follows:

1. My name is Gene Hammer and I am a General Manager for Winstar for Buildings, the real estate division of Winstar Communications Inc. I manage the Atlanta, GA market.
2. As General Manager, part of my responsibility is to oversee the negotiations of building access rights with owners or their representatives of commercial office buildings so that Winstar may install its roof top antennas, equipment and cable for the purpose of providing telecommunications services to tenants within the buildings.
3. As a representative of Winstar, I have been confronted with owners who seek to charge exorbitant fees for access to buildings. For example, this past week, the owners of a building on Marietta Street, here in Atlanta, requested payment of fees beginning at \$2,300 per month escalating up to \$4,200 per month by the end of the lease term. This monthly fee is about ten times the average monthly fee that Winstar and others in the industry have paid in this market.
4. The exorbitant fee requested by the owner of this building will likely prevent a tenant in the building who has requested service from Winstar from receiving service from Winstar, their carrier of choice, since Winstar cannot provide service to the building in an economically feasible manner.
5. It is my belief that by charging some carriers extremely high fees for building access, owners are denying consumers access to the carriers of their choice and this serious problem will continue unless a national mechanism is put in place by which this discriminatory behavior is prohibited.

I declare under penalty of perjury, that the foregoing is true and correct to the best of my personal knowledge.



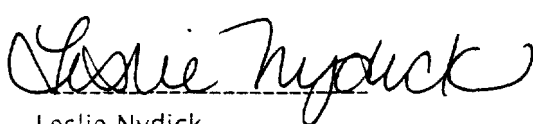
Gene Hammer  
General Manager, WfB Atlanta

AFFIDAVIT

Leslie Nydick declares as follows:

1. My name is Leslie Nydick and I am Senior Director, Real Estate with Winstar for Buildings, the real estate division of Winstar Communications, Inc..
2. Part of my responsibilities is to negotiate master agreements with large owners and managers of commercial real estate. These agreements cover numerous subjects, including access to buildings for the purpose of providing telecommunications services to tenants within the buildings.
3. Recently, Winstar has confronted several situations where owners or management firms have entered into agreements with other competitive local exchange carriers (CLECs) or building local exchange carriers (BLECs) whereby these firms have acquired an equity position in the BLECs or CLECs. By doing so, these owners or management firms have a vested interest in prohibiting equal access to their buildings by all carriers.
4. In one instance, a major owner and real estate management firm acquired an equity interest in a BLEC and as part of that agreement the real estate company is forbidden to affirmatively assist Winstar or any other carrier with access to its buildings throughout the country.
5. It is my belief that consumer access to their carrier of choice is a serious problem, particularly when the owners or managers of buildings have a financial interest in a CLEC or BLEC. This problem will continue unless a national mechanism is put in place where by discriminatory behavior is prohibited.

I declare under penalty of perjury, that the foregoing is true and correct to the best of my personal knowledge.

 9/6/00

Leslie Nydick

Senior Director, Real Estate, WFB

KELLEY DRYE & WARREN LLP

A LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL ASSOCIATIONS

1200 19<sup>TH</sup> STREET, N.W.

SUITE 500

WASHINGTON, D.C. 20036

(202) 955-9600

NEW YORK, NY  
LOS ANGELES, CA

MIAMI, FL

CHICAGO, IL

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PARSIPPANY, NJ

BRUSSELS, BELGIUM

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BANGKOK, THAILAND  
JAKARTA, INDONESIA  
MANILA, THE PHILIPPINES  
MUMBAI, INDIA  
TOKYO, JAPAN

FACSIMILE

(202) 955-9792

DIRECT LINE (202) 955-9788

E-MAIL: tedaubert@kelleydrye.com

September 1, 2000

VIA COURIER

Ms. Magalie R. Salas  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Room TW-204B  
Washington, DC 20554

Re: WT Docket No. 99-217; CC Docket No. 96-98

Dear Ms. Salas:

Edge Connections, Inc. ("Edge"), by its attorneys, hereby submits the following document for inclusion in the record in this proceeding:

1. Memoranda entitled "Explanation of Legal Issues in the License Agreement."

This document, which Edge received from a partner of BroadBand Office ("BBO"), discusses restrictive provisions in the BroadBand Office License Agreement, including a 12-month "Blackout" period during which BBO partners must restrict access to competitive telecommunications providers, and provides guidance to a BBO partner's employees on how to address requests by competitive telecommunications providers for building access. The license provisions and negotiation procedures described in the document are consistent with Edge's experience in the Atlanta market, where several different partners of BBO have told Edge that they could not enter into a building access agreement with Edge due to a "moratorium" imposed by BBO. This demonstrates the urgent need for regulation to promote non-discriminatory building access, and that reliance on market forces alone will be insufficient to ensure non-discriminatory building access, particularly where real estate entities own equity in telecommunications providers.

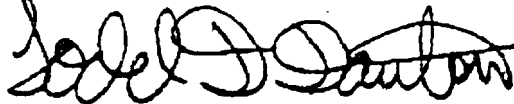


KELLEY DRYE & WARREN LLP

Ms. Magalie R. Salas  
September 1, 2000  
Page Two

An original and two copies of this notice are provided.

Sincerely,



Todd D. Daubert  
Counsel to Edge Connections, Inc.

TDD:slr

Enclosures

cc:	Clint Odom	Mark Schneider	Helgi Walker
	Peter Teuhala	Adam Krinsky	Kathy Brown
	Thomas Sugrue (WTB)	Jim Schlichting (WTB)	Jeffrey Steinberg (WTB)
	Joel D. Taubenblatt (WTB)	Lauren Van Wazer (WTB)	Leon Jackler (WTB)
	Eloise Gore (CSB)	Cheryl King (CSB)	Wilbert Nixon (WTB)
	Paul Noone (WTB)	Mark Rubin (WTB)	David Furth (WTB)
	Richard Arsenault (WTB)		

## EXPLANATION OF LEGAL ISSUES IN THE LICENSE AGREEMENT

### Restrictive Provision

The Broadband Office License Agreement is the same as the ARC agreement except that BBO imposes a 12-month "Blackout" period from September 23, 1999-September 22, 2000 restricting access to other telecommunication providers. If you enter into an agreement with Broadband, during this period the following guidelines apply:

1. Wireless companies, such as Winstar, Teligent, MCI, NEXLINK and AT&T may bring their services into the building, however, we are recommending that Hines properties enter into negotiations only if they are strongly driven by Owners or Tenants.
2. For any telecommunication providers, use the updated Hines Telecommunications License Agreement, currently being drafted, that includes some new provisions gleaned from the ARC and Broadband language. This new agreement will be placed on our database when completed.
3. The Restriction does not apply to (1) any existing telecommunications agreements as of September 23, 1999; or (2) the addition of one other such agreement with a Broadband Office competitor, such as ARC, Cypress, OnSite Access or Urban Media or any other "building centric" provider. In other words, the agreement allows a building to have 2 similar, building centric providers: BBO and one other, in addition to any existing providers during the restriction period.
4. The EXCEPTION is that any telecommunications provider may bring service directly to a tenant-not the entire building-during the blackout. The switch from the provider must, in this case, reside in the tenant's space.

ALL deals must be routed to your Regional Vice President Operations for review and approval BEFORE execution, thus ensuring these guidelines are correctly interpreted.

For your information, the following is the blackout language from the Broadband license agreement, Section 6:

"No Agreement with Direct Competitor. Licensor agrees not to enter into any access agreement with any building centric provider of bundled voice and data telecommunications services to small and medium sized businesses (including Cypress, Onsite Access and Urban Media) with respect to any Tier One Property or Tier Two Property for a period of twelve months after September 23, 1999; provided that this Section 6 does not apply to (i) any existing agreements as of September 23, 1999 and (ii) one other such agreement with such a competitor (including Allied Riser Corporation)."

Existing Rooftop Management Agreements (applicable only if existing)

The License Agreement provides for the dedication of approximately 50 square feet on the building rooftop. Several buildings are currently subject to exclusive Rooftop Management Agreements which require that all leases for rooftop space be obtained through the rooftop manager and that a fee be paid to that manager for its services. Hines has agreed that BBO and/or ARC will not be directly responsible for this fee. While ARC and BBO will contract with the rooftop management company, any fees associated with the lease of the rooftop space will be deducted from the five percent of Gross Receipts that are payable to the building under the Telecommunications License Agreement between the building and ARC/BBO. Any remaining "net" revenue will then be paid by ARC or BBO to the building.

The need for ARC or BBO to obtain rooftop space is usually confined to suburban locations where fiber is not laid for connections and the company must transmit their signal via an antenna or satellite dish. Therefore their need for rooftop space is very limited. In most metropolitan locations rooftop space is not required at this time, however ARC and BBO have the right to request the space at a future time, if additional services are made available only via antenna or dish.

Notice of Non-Renewal/Cancellation

It is recommended that, when appropriate, notice is given to terminate any exclusive agreement or that management negotiates an exclusion for itself to accommodate ARC's and BBO's rooftop space requirement. Critical termination dates in existing agreements should be carefully researched and noted.

Cable Television Exclusive Agreement

If an exclusive agreement exists, it is recommended that the Cable Television Agreement be reviewed for specific restriction language, as BBO and ARC are not considered Cable Television providers and are not licensed as such by the FCC. It is further recommended that, when appropriate, notice be given to terminate any exclusive agreement.